

DISTRICT OF NEVADA
RECEIVED

MAR 17 1999

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LANCE S. WILSON
CLERKBY 12m
DEPUTYJIMMIE DAVIS

Name

27362

Prison Number

P.O. BOX 607 CARSON CITY NEVADA 89702

Place of Confinement

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADAJIMMIE DAVIS

Petitioner,)

(Full Name))

VS.)

THE STATE OF NEVADA)

WARDEN JOHN V. IGNACIO)

Respondent,)

(Name of Warden, Superintendent, jailor or
authorized person having custody of petitioner))

and)

The Attorney General of the State of Nevada)

CV-N-99-00137-ECR (PHA)

PETITION FOR A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY
(**NOT SENTENCED TO DEATH**)

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: EIGHTH JUDICIAL DISTRICT COURT DEPT IV JUDGE EARL WHITE
2. Full date judgment of conviction was entered: 12 / 12 / 88. (month/day/year)
3. Did you appeal the conviction? ___ Yes x No. Date appeal decided: / / .
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?
x Yes 2 No. If yes, name the court and date the petition was filed: 11-28-89, 9-9-95
EIGHTH JUDICIAL DIST. COURT ¹¹⁻²⁸⁻⁸⁹ 9 / 9 / 95. Did you appeal from the denial of the petition for
post-conviction relief or petition for writ of habeas corpus? x Yes ___ No. Date the appeal was
decided: ¹⁻²⁴⁻⁹⁵ 3 / 4 / 99. Have all of the grounds stated in this petition been presented to the
state supreme court? x Yes ___ No. If no, which grounds have not?
5. Date you are mailing (or handing to correctional officer) this petition to this court: 3 / 15 / 99.
Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? ☒ Yes
☐ No. If no, what was the prior case number? _____. And in what court was the prior action filed? _____.
- Was the prior action ☐ denied on the merits or ☐ dismissed for procedural reasons (check one). Date of decision: ____/____/____. Are any of the issues in this petition raised in the prior petition? ☐ Yes ☐ No. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition? ☐ Yes ☐ No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? ☐ Yes ☒ No.
 If yes, state the name of the court and the nature of the proceedings: _____
8. Case number of the judgment of conviction being challenged: C85078
9. Length and terms of sentence(s): LIFE WITHOUT PAROLE
10. Start date and projected release date: 1988 start date NO RELEASE DATE
11. What was (were) the offense(s) for which you were convicted: FIRST DEGREE MURDER
12. What was your plea? ☒ Guilty ☐ Not Guilty ☐ Nolo Contendere. If you pleaded guilty or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:
PLEAD GUILTY TO MURDER AND LIFE WITHOUT AND THE STATE WILL NOT CERTIFY HIM ON THE ROBBERY CHARGE AND LESSER THEN DEATHPENALTY.
13. Who was the attorney that represented you in the proceedings in state court? Identify whether the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed <input checked="" type="checkbox"/>	Retained	<i>Pro se</i>
arraignment and plea	<u>STEPHEN J. DAHL/DAVID GIBSON</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
trial/guilty plea	<u>STEPHEN J. DAUL DAVID GIBSON</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
sentencing	<u>STEPHEN J. DAUL DAVID GIBSON</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
direct appeal	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1st post-conviction petition	<u>LEE ELIZABETH MCMAHON?MARK B. BAILUS</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from post conviction	<u>MARK B. BAILUS</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2nd post-conviction petition	<u>ANDRES RAPPARD</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from 2nd post-conviction	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th Amendment right to INEFFECTIVE ASSISTANCE OF COUNSEL, based on these facts:

Counsel was ineffective. Appellant recieved ineffective assitance of counsel because he did not consent to trial counseis failure to file a notice of appeal regardless of the fact that appellant was convicted pursuant to a guilty plea. rather then at trial . that he was satisfied with his attorneys performance at the time of sentencing, which is the issue now before the court. Appellant was not happy with his attorneys performance . on 11-28-88 appellant was granted a continuance before sentencing because his mother was attempting to retain private counsel (ID RECORD)

On DEC. 12 1988 appellants mother was unable to get the money to obtain private counsel. and appellant being 16 was unable to have that kind of moneyso the judge imposed a sentence of life without the possibility of parole. No appeal followed even though the appointed counsel knew that the appellant was unhappy with the whole situation before,during and after the sentencing. FAILURE of appointed counsel to take an appeal despite appellants request is ineffective assistance of counsel as a matter of law without regard to probability of success, But had counsel done a direct appeal he would have succeeded on di ect appeal through plain error when the court violated fed rule 11 on three rights but the most important one being that appellant was not told the elements of

1 the crime. Needless to say counsel has caused major damage
 2 to the appellants appeal process because the court has
 3 found that the burden of setting aside a guilty plea based
 4 upon a rule 11 violation appears to be greater in a collateral
 5 proceeding then on direct appeal from a judgement of conviction.
 6 On collateral attack however appellant must show that
 7 the error is constitutional or jurisdictional in charater
 8 before he may obtain relief.

9 Counsel knew that appellant wantted to with draw
 10 his plea before sentencing and was unhappy with his
 11 representiation when his mother was trying to obtain
 12 private counsel . . .) and made this known
 13 to the parole and probation reporter ~~see~~ P.P. RECORD
 14 but counsel only got a continuance plus only told the
 15 court that appellants mother was trying to obtain private
 16 counsel but made no mention of withdrawing appelants
 17 plea or perfecting an appeal. and a week or so later
 18 still let appellant be sentenced to life without the
 19 possibikity of a parole. Appellant ~~sent~~ -counsel numrous
 20 letters in regards to this matter and recieved no responce
 21 until a motion was filed to force him to respond see
 22 RECORD . . . but this process had surly eaten
 23 up the 30 days for a direct appeal so they expired.,

24 The nevada supreme court stated inits second deniel
 25 that failure of appellant to bring a direct appeal;
 26 Well appellant did not know he had a direct appeal and
 27 explained to the court that he tried to get counsel
 28 to perfect somthing but counsel ignored lettes until

1 a motion was made to the court.

2
3 for the reasons set forth appellant asks the court
4 to allow the appellant to plead ae anew and or ay any
5 other relief it deems nessary.

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10 respectfully submitted,
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Exhaustion of state court remedies regarding Ground 1:► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

 Yes x No. If no, explain why not: APPELLANT DID NOT AND WAS NOT TOLD OF HIS
RIGHT TO DIRECT APPEAL AND ATTORNEY WOULD NOT FILE IT► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

 Yes x No. If no, explain why not: DID NOT KNOW OF THE RIGHT TO A DIRECT
APPEALIf yes, name of court: _____ date petition filed / / Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____If yes, did you raise this issue? Yes No. If no, explain why not: _____► **Second Post Conviction:**Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus? x Yes No. If yes, explain why: TO EXHAUST STATE REMEDIES AND APPELLANT
HAS SINCE LEARNED HOW TO READ AND WRITE.If yes, name of court: EIGHTH JUDICIAL DISTRICT CT. date petition filed 9 / 9 / 95Did you receive an evidentiary hearing? x Yes No. Did you appeal to the Nevada Supreme Court? x Yes No. If no, explain why not: _____If yes, did you raise this issue? x Yes No. If no, explain why not: _____► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? Yes x No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my
6th Amendment right to EFFECTIVE ASSISTANCE OF COUNSEL

based on these facts:

Counsel was ineffective befor during and after guilty plea.
 appellant was denied his constitutional right to effective assistance
 of counsel from beginning of the case there was a confession that
 was illegally obtained, counsel never filed any motions to have
 it thrown out nor did he even read it because if he had he would
 have known appellants age was 16 which it says at the top of confession
~~SEE RECORD~~ and not told the district attorney that appellant
 was 18 ~~SEE RECORD~~ which led to more charges. He also
 would have known that appellant could not read or write well if
 he had done any investigation. The Nevada supreme court stated
 that appellant was of sophistaction and intellegence but what they
 did not state was appellant had low special education classes in
 school and could not read or write the english language above a
 second grade level ~~SEE RECORD OF SECOND COURT DATE~~ Counsel also did not
 interview Webster Leanord Davis who witnessed the interview.

In order for counsal
 to make a stratigic choice as to challenge the confession or not
 would start first with an interview and a reading of the confession
 competent counsel would have done this. He was and is still willing
 to testify to the events that took place that day. 10 out of 10
 compenent counsels stated when pæesented with this case at the

1 beginning the first thing they would have done was file
 2 a motion to suppress the confession regardless of its success
 3 but to reserve the issue for appeal for the client and build
 4 a complete record. The performance of counsel was not only
 5 constitutionally unreasonable and ineffective but counsel
 6 abandoned required duty of loyalty to client by not moving
 7 to have the proceedings held in arrest until the jurisdiction
 8 subject matter was resolved which attached when counsel
 9 mistakenly told the district attorney that appellant was
 10 18 when in fact he was 16, with this error leading to more
 11 charges. The Nevada Supreme Court stated in its denial
 12 that a minor who is charged with murder enters the adult
 13 criminal justice system such a person is not entitled to
 14 the protections of the juveniles court system/ The juvenile
 15 court never acquires jurisdiction over him..... That warning
 16 him that he was subject to the adult criminal justice system
 17 and penalties in that system is not required. All of this
 18 could be said to be true if not the robbery been charged
 19 see judges statement At Plea Hearing "Thats Jurisdictional"
 20 and appellant Held to answer for said charge see GUILTY PLEA
 21 HEARING Once the robbery was charged counsel should have
 22 moved to dismiss the robbery charge and or had proceeding
 23 held until a certification hearing could be held but instead
 24 he allowed it to be used as a threat of further prosecution
 25 see GUILTY Plea Hearing Once the robbery charge was charged
 26 and appellant held to answer subject matter jurisdiction
 27 attached proceeding should have been postponed until the
 28 matter was resolved And even though Nevada has since amended

1 said statue to include robbery and other charges appellant
 2 is up under the law in effect at the time of the crime in
 3 1988 and at that time THE robbery need not be charged but
 4 when it is jurisdiction did attached and a certification
 5 hearing should have been held which was not a garenteed
 6 certication just because the serious nature of the crime
 7 and in 1988 it was not blancedly applied but serious crimes
 8 were sent to ELko youth cente Spring mountain youth center
 9 and C.Y.A. among other alteratives Where a chance at
 10 rehabilitation could be taken.

11 Had counsel called webster leonsrd davis he would have let
 12 counsel know that appellant was 16, that appellant was taken into three
 13 diffrent rooms and that appellant did not understand his rights
 14 and that appellant told the police that he did not understand his rights
 15 by saying no but the detective wrote yes in his own handwritting to
 16 the question see Record on appeal Appellant could not even spell
 17 ADAM see CONFESSIO Counsel did not simply make poor
 18 strategic choices. he acted with reckless disregard for his clients
 19 best intrest and at times apparently with the intention to weaken his
 20 clients case when he gave false information that he should have known
 21 which led to amended charges on his client . While a criminal trial
 22 is not a game in which the participants are expected to enter the ring
 23 with a near match in skills neither is it a sacrifice of unarmed prisoners
 24 to gladiators.

25 Appellants conviction is unreliable due to the break down in
 26 the adversary process caused by deficiency in counsels performance.
 27 appellant would not have pleaded guilty had appointed counsel done his
 28 duty to investigate.

1 For the reasons set forth above the appellant asks that the
2 court allow the appellant be allowed to plead anew and or ay any other
3 remedy the court deems necssary.

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6 Respectfully submitted,
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Exhaustion of state court remedies regarding Ground 2:

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☐ Yes ☒ No. If no, explain why not: ATTORNEY WOULD NOT FILE A DIRECT APPEAL

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: _____

If yes, name of court: EIGHTH JUDICIAL DISTRICT COURT date petition filed 11 / 28 / 89

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☐ Yes ☐ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ____ / ____ / ____

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 14th, FRCrP RULE 11 Amendment right to Guilty plea not knowing ly, voluntarily, understandingly and intelligently entered, based on these facts:

A guilty plea is an admission of all the elements of a formal criminal charge, it can not be truly voluntary unless the defendant possess an understanding of the law in relation to the facts and elements of the crime. Appellant was never told or explained the elements of the crime on or off the record ID plea hearing a full Record If an appellants guilty plea is not voluntary and knowing if it has been obtained in violation of due process and is therefore void, more over because a guilty plea is the admission of all of a formal charge it cannot be truly voluntary unless the appellant posses an understanding of the law in relation to the facts. From the beggining appellant never said he intentionally caused the death of the victim, the detective testified to this see His Testimony on Record the states witness testified to this that shooting was accident. parole and probation was told that shooting was an accendent on Record the constitutional rules of Federal rules 11 advice to defendant rrequires 5 minnum requirements applicable to the states through the 14amendment. They have not been met here in the case now before the court, a challenge to a guilty plea is reviewed for clear error of constitutional demension, appellant was never explained the elements of the offence by judge, counsel, or any

1 hearing on or off the record nor in private. these are
2 important constitutional rights. appellant can not plead
3 to something he does not know because he may be actually
4 innocent of the crime charged but guilty of a lesser offence
5 but this can only be known through the appellant having
6 an understanding of the elements for which he pleads .

7 appellant would not have pleded guilty had he known
8 the elements of first degree murder and had been explained
9 what malice , intent, aforethought ment or that they ment
10 that he intentionally caused the death of the victim. appellant
11 would not have pleaded guilty but onlypleaded to manslaughter
12 and or insisted on going to trial. but appellant was not
13 given this choice when he was not explained the elements
14 of the crime at any time see appendix . of plea hearing

15 . NOR was appellant ever told about any lesser
16 included offences.

17 Appellants appeals have never been about an abandonment
18 of responsibility but what is being sought is Justice. Justice
19 tempered with mercy. Accountability, Accountability tempered
20 with rehabilitation and punishment in accordance with due
21 process of the laws upheld by the constitution.

22 A waiver of fundamental rights can not be assumed
23 from a silent record.

24 For the reasons set forth above appellant prays that the
25 court grant the relief sought and allow appellant to plead
26 anew and any othe r relief the court deems nessary.

27 respectfully submitted,

___ Yes x No. If no, explain why not: ATTORNEY WOULD NOT FILE A DIRECT APPEAL

 X Yes No. If no, explain why not:

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not:

 Yes No. If yes, explain why:

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue?___ Yes ___ No. If no, explain why not:

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

5th Amendment right to MIRANDA,

based on these facts:

When the dective signed Yes to the question of do you understand
these rights after appellatnt, told him no see

he was in violation of the constitution and fed rules governing

MIRANDA, questioning should have ceased.

The Nevada supreme court stated that a juvenile has the capacity

to make a voluntary confession without the presence or assistance

of a parent guardian and his confession is not involuntary

simply because no such adult was present. This is true but a

juvenile is not alowed to be tricked when he has stated that

he does not understand his rights and there have the detective

write yessee ~~CONFESION~~

The detective testified that he asked appellatnt to read it

see Preliminary Hearing The detective phrased his answer this

way because he knew appwllant could not read or write so in

order not to incriminate him self he gave a political answer

as a politian would do to a hard question in a debate . He should

not have wrote yes in the blank next to appellants name because

it was the appellatnt not the detective who was givving up those

precious rights and even though it is a rare occation that a

guilty plea can be challenged through a miranda violationit

has been done; For the reasons set forth appellatnt askes the

1 court to allow the appellant to plead anew and or any

2 other remedy it deems nescary.

3 Respectfully submitted,

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5 _____
6 JIMMIE DAVIS 27362
7 PO BOX 607
8 CARSON CITY NEVADA
9 89702
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Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

 Yes x No. If no, explain why not: attorney would not file direct appeal

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: _____

If yes, name of court: EIGHTH JUDICIAL DISTRICT COURT date petition filed 11 / 28 /89.

Did you receive an evidentiary hearing? ___ Yes ___^x No. Did you appeal to the Nevada Supreme Court? ^x Yes ___ No. If no, explain why not: _____

If yes, did you raise this issue? x Yes ___ No. If no, explain why not: _____

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

____ Yes ____ No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ____/____/____.

Did you receive an evidentiary hearing? ☐ Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: _____

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: _____

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain: _____

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

(Name of person who wrote this
complaint if not Plaintiff)

JIMMIE DAVIS
(Signature of Plaintiff)

3-15-99
(Date)

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at NEVADA STATE PRISON on 3-15-99
(Location) (Date)

JIMMIE DAVIS
(Signature)

27362
(Inmate prison number)

1 NEOJ
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

FILED
MAR 7 1 49 PM '96

Christina Thomas
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JIMMIE DAVIS
12 #0854767

13 Defendant.
14

Case No. C85078
Dept. No. IV
Docket C

15 NOTICE OF ENTRY OF ORDER

16 TO: JIMMIE DAVIS, Defendant in proper person

17 YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action,
18 a copy of which is attached hereto.

19 DATED this 6th day of March, 1996.

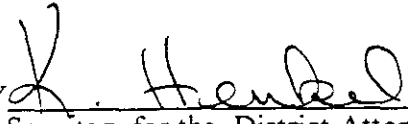
20 STEWART L. BELL
21 DISTRICT ATTORNEY
22 Nevada Bar #000477

23 BY *David J. Roger*
24 DAVID J.J. ROGER
25 Chief Deputy District Attorney
26 Nevada Bar #002781
27
28

CERTIFICATE OF MAILING

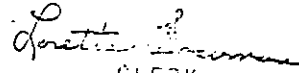
I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made the 6th day of March, 1996, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

ANDRES R. RAPPARD
633 S. FOURTH ST., #8
LAS VEGAS, NEVADA 89101

BY 
Secretary for the District Attorney's Office

FILED

MAR 4 9 36 AM '96


 CLERK

1 **ORDER**
 2 STEWART L. BELL
 3 DISTRICT ATTORNEY
 4 Nevada Bar #000477
 5 200 S. Third Street
 6 Las Vegas, Nevada 89155
 7 (702) 455-4711
 8 Attorney for Plaintiff

DISTRICT COURT
 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,
 8 Plaintiff,

9 -vs-

10 JIMMIE DAVIS,
 11 #0854767

12 Defendant(s).

Case No.. C85078
 Dept. No. IV
 Docket C

13
 14 **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**
 15 **(POST-CONVICTION)**

16 DATE OF HEARING: 1-24-96
 17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing on the 24th day of January, 1996, the Petitioner being
 19 present, represented by ANDRES RAPPARD, ESQ., the Respondent being represented by STEWART
 20 L. BELL, District Attorney, by and through DAVID J.J. ROGER, Chief Deputy District Attorney, and
 21 the Court having heard oral arguments of counsel, the Court took this matter Under Advisement. Based
 22 upon the following discussion, Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) is
 23 hereby denied.

24 **STATEMENT OF THE CASE**

25 Jimmie Davis, (hereinafter referred to as "Defendant"), was arrested August 1, 1988, in
 26 connection with the shooting death of Brittain Gelabert. A preliminary hearing was held August 25,
 27 1988, and Defendant was bound over to District Court. On September 8, 1988, an Information was filed
 28 charging Defendant with one count MURDER WITH USE OF DEADLY WEAPON (Felony - NRS

1 200.010, 200.030, 193.165); and one count ROBBERY WITH USE OF DEADLY WEAPON (Felony -
2 NRS 200.380, 193.165).

3 On October 12, 1988, following negotiations with the District Attorney, Defendant pled guilty
4 to FIRST DEGREE MURDER and stipulated to Life without parole. On December 20, 1988, Judgment
5 of Conviction (Plea) was entered and Defendant was sentenced to Life in the Nevada State Prison
6 without the possibility of parole.

7 On December 20, 1989, Defendant and appointed counsel, Mark Bailus, filed Defendant's first
8 Petition for Post-Conviction Relief alleging *inter alia*: 1) involuntary entry of guilty plea, and 2)
9 ineffective assistance of counsel. On April 15, 1992, this Court denied Defendant's petition and an appeal
10 was taken. On January 24, 1995, the Nevada Supreme Court dismissed Defendant's appeal in Case No.
11 23338.

12 On September 9, 1995, Defendant filed a second pro per Petition for Writ of Habeas Corpus
13 (Post-Conviction) along with a pro per Motion for Appointment of Counsel. On September 27, 1995,
14 the district court granted Defendant motion to appoint counsel, and subsequently defense counsel filed
15 a First Amended Petition for Writ of Habeas Corpus.

16 STATEMENT OF THE FACTS

17 On July 31, 1988, the Defendant and two (2) friends, Arthur Cullins and Ringo, were located at
18 25 Britz Circle Apt. B, North Las Vegas, Nevada. The apartment has a reputation among residents as
19 a "hangout" for drug transactions and other illicit activities. At about 5:30 p.m., the young men were
20 approached by the victim, Brittain Gelabert, who wanted to sell a .38 caliber Smith and Wesson revolver
21 for \$100.00.

22 Brittain removed the gun and several bullets from her purse and placed them on the counter top.
23 The Defendant picked up the gun, opened the cylinder, loaded it, pointed the gun at Brittain, and
24 demanded she lower the price. To Brittain's detriment, she refused. The Defendant then decided to keep
25 the gun without paying for it and told Brittain to leave. When Brittain again refused, the Defendant shot
26 her (Def's District Court file statement of the Defendant).

27 Forensic Pathologist, Sheldon Green, testified at the Defendant's preliminary hearing that Brittain
28 died from a single bullet wound to the right chest area, fired from "some distance." (Def's Preliminary

1 Hearing Trans. at 27).

2 DECISION

3 Ground One, alleges the Defendant's guilty plea was the coerced result of an improperly filed
4 robbery charge. Defendant claims he should be permitted to withdraw his plea because the proceedings
5 were tainted. The voluntary nature of Defendant's plea has previously been decided on the merits and
6 is the Law of the Case. (Exhibit "A" - Order Dismissing Appeal).

7 The Nevada Supreme Court has determined that all claims which have previously been heard and
8 decided on the merits cannot be revisited in a subsequent appeal based on the Doctrine of the Law of the
9 Case. The ruling in the first instance becomes the law of the case for all subsequent proceedings. Hall
10 v. State, 91 Nev. 314, 535 P.2d 797 (1975); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994)
11 (Law of the Case applies to Petitions for Writ of Habeas Corpus).

12 Also, Defendant's allegation that his guilty plea was the result of an improperly filed robbery
13 charge is contrary to the record. The record clearly states the District Attorney was initially under the
14 mistaken belief that the Defendant was an adult. Once the District Attorney was made aware of the
15 Defendant's correct age, 16, the robbery charge was dismissed for lack of District Court jurisdiction. The
16 District Attorney affirmatively stated the dismissal of said robbery charge was not a part of the
17 negotiations. The State did however acquiesce to an agreement not to pursue said charge in Juvenile
18 Court (Exhibit "B" - Transcript of Def's Plea at 117-119). This course of action is consistent with plea
19 negotiations and Defendant's plea was not the result of improper influence. Schmidt v. State, 94 Nev.
20 665, 666, 584 P.2d 695, 696 (1978).

21 Ground Two, alleges defense counsel was ineffective for failing to file a motion to dismiss the
22 robbery charge which was improperly filed in District Court.

23 The Defendant's argument is meritless because the robbery charge was in fact dismissed by the
24 District Attorney prior to the taking of Defendant's plea and was not a part of the negotiations.
25 Defendant fails to show prejudice or how counsel's performance was deficient and therefore this
26 allegation is dismissed. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Warden v.
27 Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

28 Defendant's pro per petition alleges his conviction was obtained by the use of an illegally coerced

1 confession. In its first response, the State raised the procedural bar of NRS 34.810, which reads:

2 1. The court shall dismiss a petition if the court
determines that:

3 (a) The petitioner's conviction was upon a plea
4 of guilty and the petition is not based upon an allegation
5 that the plea was involuntarily or unknowingly entered
or that the plea was entered without effective assistance
of counsel.

6 (Emphasis added).

7 Defendant's First Amended Petition alleges this court should decide the issue on the merits
8 because procedural bars are not regularly and strictly enforced. Defendant's argument is meritless
9 because procedural bars are routinely enforced. Marshall v. State, 110 Nev. 1328, 1331 n.1, 885 P.2d
10 603, 605 n.1 (1994); Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993); Phelps v. Director
11 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

12 The decision whether to employ the procedural bar is not a discretionary matter. The plain
13 language of the statute directs that the court "shall" dismiss claims which do not fall within the statute.
14 The State legislative intent is clear. Therefore, this allegation is dismissed.

15 Defendant claims the procedural bar of NRS 34.810 (2) does not apply because the issues
16 presented are sufficiently different. The statute reads:

17 A second or successive petition must be
18 dismissed if the judge or justice determines that it fails
19 to allege new or different grounds for relief and that the
prior determination was on the merits or, if new or
20 different grounds are alleged, the judge or justice finds
that the failure of the petitioner to assert those grounds
in a prior petition constituted abuse of the writ.

21 (Emphasis added).

22 The Court finds that Defendant's allegations are not sufficiently different to justify relitigating the
23 same issues. Further, those issues which are sufficiently different constitute a "piecemeal approach,"
24 Darnell v. State, 98 Nev. 518, 521, 654 P.2d 1009, 1011 (1982), and an abuse of the writ.

25 Over the past seven (7) years, Defendant has been provided every opportunity to fairly contest
26 the validity of his conviction. The Nevada Supreme Court has stated, "At some point, we must give
27 finality to criminal cases" Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). The
28 defendant shall not file another petition for writ of habeas corpus without prior permission of this court.

1 Defendant next alleges his case was prejudiced because he never consented to waive his right to
 2 a direct appeal. Assuming Defendant was denied this right, the Defendant's remedy is to pursue post-
 3 conviction relief, which he has twice been permitted to do. Defendant's contention that he should be
 4 released (Def's First Amend Pet. at 7), is unwarranted and contrary to Nevada Law.

5 A defendant's right to a direct appeal is not constitutional, Castillo v. State, 106 Nev. 349, 792
 6 P.2d 1133 (1990), but statutory, NRS 177.015(3). When a defendant is deprived of this right, review
 7 by the Nevada Supreme Court is lost and prejudice is presumed. Fawaz v. State, 105 Nev. 682, 783 P.2d
 8 425 (1989).

9 Recently the Nevada Supreme Court addressed this very situation in Lozada v. State, 110 Nev.
 10 349, 871 P.2d 944 (1994). The High Court determined the appropriate remedy when a defendant is
 11 denied the right to a direct appeal is to raise any issues, which could have been raised on direct appeal,
 12 in a petition for post-conviction relief. The Court's opinion stated:

13 If [defendant] can establish his claim that he was denied
 14 his right to effective assistance of counsel on appeal,
 15 which had the effect of denying [defendant] his right to
 16 appeal, the appropriate remedy would be to allow
[defendant] an opportunity to raise in a petition for a
writ of habeas corpus any issues which he could have
raised on direct appeal. . . .

17 A complete remedy will exist, however, only if
 18 the district court grants [defendant] counsel to assist
 him in the preparation of a petition for a writ of habeas
 corpus.

19 Id. at 359, 871 P.2d at 950 (emphasis added).

20 The Defendant has twice been permitted to raise issues in petitions for post-conviction relief and
 21 in both instances counsel has been appointed to assist him. Evitts v. Lucey, 469 U.S. 387, 394, 395, 105
 22 S.Ct. 830, 834, 835 (1985). The Defendant has been afforded every right available under Lozada and
 23 his contention that he be released is meritless.

24 The Court has reviewed the record in this case. The Defendant entered into a plea bargain with
 25 the State. He was sentenced by the Court in accordance with the plea bargain.

26 Defendant has failed to identify any additional issues that he would have raised on direct appeal.
 27 Likewise, this Court's review of the record establishes that there are no legitimate issues resulting from
 28 his plea and sentence. Therefore, this claim for relief is denied.

1 Next, Defendant claims that he is entitled to relief because his confession was taken in violation
2 of *Miranda*. The United States Supreme Court has held that a confession taken in violation of *Miranda*
3 v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) may not be used as substantive evidence against the
4 defendant. However, a *Miranda* violation does not bar further prosecution. *Id.* at 479, 86 S.Ct. at 1630.
5 The Defendant's request for relief is meritless because Defendant waived his right to raise this issue by
6 virtue of his guilty plea. *Cline v. State*, 90 Nev. 17, 518 P.2d 159; *Warden v. Lyons*, 100 Nev. 430, 683
7 P.2d 504 (1984).

8 Also, even if a *Miranda* violation did occur, Defendant is unable to show prejudice because the
9 State never proffered the statement. Defendant's allegation is without legal support and it is hereby
10 dismissed.

11 Defendant's final claim alleges counsel was ineffective for failing to move for dismissal of an
12 improper robbery charge. This allegation is without merit because, as has been previously discussed, said
13 robbery charge was dismissed and was not used by the prosecution as leverage during the plea
14 negotiations (Exhibit "B" - Transcript of Def's Plea at 117-119).

15 Defendant's allegation "that his attorney failed to remove the prime reason for his guilty plea: the
16 wrongful robbery charge" (Def's First Amend Pet. at 9) (emphasis added), is patently disingenuous. In
17 return for Defendant's guilty plea to FIRST DEGREE MURDER, the State agreed not to seek the death
18 penalty and to drop the deadly weapon enhancement. This court finds that it is incredible that
19 Defendant's "prime reason" for negotiating a plea was to avoid a robbery charge when the full extent of
20 the law exposed the Defendant to death penalty, or at least a consecutive life sentence on the use charge.

21 It is readily apparent Defendant is attempting to attack the voluntary nature of his plea because
22 his present circumstances, serving a life sentence without the possibility of parole, suggest he has nothing
23 to lose by playing the "new trial lottery." Such attacks on properly negotiated pleas clog the already
24 burdened judicial calendar and attempt to circumvent justice.

25 Obviously it was the overwhelming evidence of guilt, the possibility of the death sentence, and
26 the deadly weapon enhancement which motivated the Defendant to plead guilty; not the robbery charge.
27 The record is clear that the robbery charged was dismissed prior to the Defendant entering his plea and,
28 despite what he may say from his cell, the evidence clearly indicates he would not have wanted to go to

1 trial. Hill v. Lockhart, 474 U.S. 52, 61, 106 S.Ct 366, 371 (1985); see Warden v. Lyons, 100 Nev. 430,
2 683 P.2d 540 (1984)

3 ORDER

4 THEREFORE, IT IS HEREBY ORDERED that the Defendant's Petition for Writ of Habeas
5 Corpus (Post-Conviction) shall be, and it is, hereby denied.

6 DATED this 29th day of February, 1996.

7
8 **GERARD J. BONGIOVANNI**

9 DISTRICT JUDGE

10 STEWART L. BELL
11 DISTRICT ATTORNEY
12 Nevada Bar #000477

13 BY David J.J. Roger
14 DAVID J.J. ROGER
15 Chief Deputy District Attorney
16 Nevada Bar #002781
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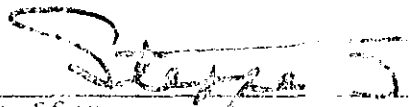
Loretta Bowman
CLERK

Appellant has not demonstrated how his counsel's actions fell below an objective standard of reasonableness. Specifically, exclusion of appellant's statement was not warranted, and appellant was not prejudiced because counsel did not file a motion to exclude it. Appellant's uncle went with appellant when appellant gave his statement. Although the uncle may not have been an actual parent or guardian, he clearly was acting in that capacity, with appellant's consent. Moreover, a juvenile has the capacity to make a voluntary confession without the presence or assent of a parent or guardian, and his confession is not involuntary simply because no such adult was present. *Marvin v. State*, 95 Nev. 836, 840 n.4, 603 P.2d 1056, 1058 (1979). Further, a minor who is charged with murder enters the adult criminal justice system. Such a person is not entitled to the protections of the juvenile system, and the juvenile court never acquires jurisdiction over him. NRS 62.040(1); *Shaw v. State*, 104 Nev. 100, 753 P.2d 888 (1988). Warning appellant that he was subject to the adult criminal justice system and the penalties in that system is not required. There is every indication that appellant voluntarily gave his statement to the police, knowing he faced serious punishment, and the police did not promise him treatment as a juvenile. Where, as here, the nature of the charges and the identity of the interrogator reflect existence of an

Appellant further contends that the district court erred in denying his motion for a hearing on his petition for post-conviction relief. Specifically, appellant contends that a hearing was required because claims of ineffective assistance of counsel involve questions of fact that can only be resolved at an evidentiary hearing.

A petitioner is entitled to an evidentiary hearing if a petition for post-conviction relief alleges facts that, if true, would entitle the petitioner to relief, unless the available record repels the petitioner's claims. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). The witnesses whom appellant contends counsel should have investigated had given statements to the police that inculpated appellant and did not support appellant's proposed theories of the case. Thus, the record does not support appellant's contention that he was prejudiced by counsel's failure to interview these witnesses. Consequently, the district court did not err by refusing to conduct an evidentiary hearing on appellant's petition. See id. Accordingly, appellant's contentions lacking merit, we

ORDER this appeal dismissed.


_____, C. J.
Steffen


_____, J.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE DAVIS,

No. 28400

Appellant,

FILED

vs.

MAR 04 1999

THE STATE OF NEVADA,

Respondent.

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

JIMMIE DAVIS,

No. 31521

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER DISMISSING APPEALS

Docket No. 28400 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 31521 is a proper person appeal from a district court order denying appellant's motion to correct an illegal sentence.

On December 20, 1988, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree murder. The district court sentenced appellant to serve a

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE DAVIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 20338

FILED

JAN 24 1995

ORDER DISMISSING APPEAL

ANNETTE M. BLOOM
 CLERK OF SUPREME COURT
 BY S. J. BLOOM
 (CHIEF DEPUTY CLERK)

This is an appeal from an order of the district court denying appellant's petition for post-conviction relief. On October 12, 1982, appellant appeared before the district court and entered a plea of guilty to one count of first degree murder. In a judgment of conviction entered on December 30, 1989, the district court sentenced appellant to serve a term of life in the Nevada State Prison.

On December 20, 1988, appellant filed in the district court a proper person petition for post-conviction relief, together with a motion for appointment of counsel. The district court appointed counsel. Appellant, through counsel, filed in the district court supplemental points and authorities in support of his petition for post-conviction relief. The state opposed the petition. On April 15, 1992, the district court, without conducting a hearing, entered an order denying appellant's

and to intending to obtain a gun from the victim without paying for it. A defendant may, as appellant did, enter a valid guilty plea by making a factual admission of guilt. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). Such a plea is valid without a canvass by the district court regarding the elements of the charge. Id.

Appellant further contends that the district court erred in determining that his counsel was not ineffective in advising him regarding entry of his plea. Appellant contends that his counsel was ineffective because counsel: (1) did not interview two witnesses to the shooting; (2) did not file pretrial motions seeking to exclude from evidence appellant's statement on the bases that appellant was only sixteen years old when he gave the statement and a parent was not present and that appellant was not advised that he would be tried on the murder charge in the adult criminal system, that any statements made by appellant would be used against him in the adult system, and that he faced a possibility of receiving the death penalty if convicted on the murder charge; and (3) did not seek exclusion of the statement because the police interrogated appellant at the North Las Vegas Police Station rather than a juvenile facility.

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, an appellant must demonstrate that his counsel